

Served: March 31, 1992

NTSB Order No. EA-3522

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 18th day of March, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

SE-9968

ROBERT ALAN EWERT,

Respondent.

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge Joyce Capps issued in this proceeding on September 12, 1989, at the conclusion of an evidentiary hearing.¹ By that decision the law judge affirmed in part² an order of the Administrator which suspended respondent's commercial pilot certificate with hot air

¹An excerpt from the hearing transcript containing the initial decision is attached.

²The Administrator's order was issued against respondent's airline transport pilot certificate. The law judge concluded that the order should be affirmed only to the extent that it suspended respondent's commercial certificate with hot air balloon rating. The Administrator has not appealed that ruling.

balloon rating for 30 days. The allegations are that respondent violated section 91.9 of the Federal Aviation Regulations ("FAR"), 14 C.F.R. Part 91,³ when the Raven S-60A balloon which he was operating as pilot in command collided with a power line.

Respondent asserts on appeal that the law judge's initial decision was erroneous and should be reversed because the Administrator, who tried the case under the Lindstam doctrine,⁴ failed to produce evidence to rebut respondent's explanation for the incident, which was that an unanticipated downdraft, and not respondent's negligence, caused the balloon to descend into the power lines. Respondent also contends that the law judge's credibility determination against him is not supported by the evidence. The Administrator has filed a brief in reply urging the Board to affirm the initial decision and the suspension order, as modified by the law judge.

³FAR section 91.9 provided at the time of the subject incident as follows:

"§91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

⁴In Administrator v. Lindstam, 41 CAB 841 (1964) it was ruled that circumstantial evidence may establish a prima facie case of negligence. Under this doctrine, the Administrator need not prove by direct evidence any specific act of carelessness on the part of a respondent if the circumstances are such that they would lead to the reasonable inference that the incident would not have occurred but for carelessness on the respondent's part.

Upon consideration of the briefs of the parties and the entire record, the Board has concluded that safety in air commerce or air transportation and the public interest require the affirmation of the Administrator's order, as modified by the law judge with regard to the airman certificate to be suspended. For the reasons that follow, we will deny respondent's appeal.

According to the evidence of record, on the morning of March 17, 1988, respondent launched his balloon with four passengers on board. The flight proceeded without incident until respondent attempted to land the aircraft.

Respondent's first landing choice was rejected by his ground crew, who advised him by radio that the site was unsuitable.

Respondent then proceeded to a field which he believed would be suitable for landing. Respondent claims that he flew the balloon over some houses approaching at an altitude of more than 200 feet in level flight. Respondent's testimony on this point is contradicted in significant detail by that of his passengers, who indicated that a downward glide path had been established. Respondent claims that he had no reason for concern for power lines which he could see from a distance, as he felt certain that he would clear them. In circumstances over which there is disagreement, the balloon began a descent towards the field and struck the power lines,

severing some of them.⁵ The incident caused minor injuries to respondent's passengers.

While respondent was unable or unwilling to offer any explanation of the incident when initially interviewed, he asserted on the stand that he believed his descent into the power lines was caused by an unanticipated downdraft. He produced an expert meteorologist who opined that, based on the terrain and its vegetation, as described to him by respondent, and based on his familiarity with the weather conditions in the Phoenix area, a significant downdraft could have been created by a surface temperature inversion, which could have caused the balloon to be pulled down toward the power lines.⁶

Notwithstanding this expert's opinion as to the probable cause of the incident, the law judge concluded that the collision was caused not by a downdraft, but by respondent's own acts in commencing a descent before clearance into the landing area had been assured. The Board has carefully reviewed the record in this case and we have no reason to disturb the law judge's decision, as it rests primarily on

⁵Respondent claims that the balloon began an unplanned descent which he attempted to counter with several applications of heat. However, at least one of his passengers testified to being in a "glide-path" to the field, from which testimony it can be inferred that a planned descent may have been initiated.

⁶The witness was not a balloonist and had not examined the site of the incident.

credibility findings, which in turn were based in large part on the testimony of an FAA inspector who described respondent's initial response to his investigation as "evasive" and who concluded, as even respondent initially did,⁷ that the incident was caused by respondent's carelessness. The law judge had an opportunity to observe the demeanor and presentation of all witnesses in the critical issue of whether the descent to the landing field was initiated by respondent or by some unforeseen atmospheric event. The issue of the initiation of descent was central because, as testified by FAA witnesses and nowhere disputed, passage over power lines in level or ascending flight is recommended, since the emergency response time of a balloon is poor and will be compounded if a balloon is already in descent. None of respondent's passengers could support respondent's claim of a descent initiated by external force. None of them felt anything unusual just prior to the collision. None of them noticed a dramatic, sudden, or abrupt change in the balloon's rate of descent.⁸ Instead, at least one of the passengers, also a pilot, testified that the balloon was already established on a glide-path to the field

⁷Respondent was initially unable or unwilling to speculate as to the reason for descent into the wires; he indicated that first he believed he had been responsible himself. (Transcript, at 139).

⁸Even respondent admitted that "it wasn't a whoosh kind of thing."

when the rate of descent increased, thus directly controverting respondent's claim that the balloon was in a state of equilibrium as it headed over the houses and towards the landing site.⁹

Concurring then in the law judge's credibility determination, we turn next to respondent's claim that, in any event, he should have prevailed because procedurally the Administrator failed to go forward with evidence to rebut his explanation for the cause of the incident. We disagree. Respondent's argument misconstrues the Lindstam doctrine. As the Board noted in Administrator v. Sanders, 4 NTSB 1062, 1064 (1983), "[o]nly after a respondent establishes that his alternate explanation of the cause of an accident is reasonable, does the burden shift back to the Administrator." See also Administrator v. Davis and Manecke, 1 NTSB 1517, 1521 (1971). While the Board has recognized that sudden wind changes may prove exculpatory under certain circumstances in a given balloon incident, see e.g., Administrator v. Neil, 5 NTSB 732 (1985), respondent's claim of a downdraft was unconvincing to the law judge, because of her prior

⁹Respondent nonetheless places great emphasis on the testimony of this same passenger who surmised that "we either hit some kind of a downdraft or something." We note, however, that this witness then stated, "[W]hat occurred I don't know..." In our view, this testimony, relating to the period just prior to the collision, is not sufficient to undo the more damaging assessment -- that respondent had intentionally begun a descent -- which the law judge drew from this witness's account.

conclusion that descent to the field was intentional and controlled. Therefore, however plausible the expert analysis of potentially unusual downdrafts, no rebuttal was required.

The judge was within her discretion when she concluded that an atmospheric condition powerful enough to pull a balloon uncontrollably out of level flight would have been noticed by the passengers. Her belief that the "glide-path" was initiated by respondent is supported by testimony and sufficient to sustain a finding of carelessness.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order, as modified by the initial decision and the initial decision are affirmed; and
3. The 30-day suspension of respondent's commercial pilot certificate with hot air balloon rating shall begin 30 days after service of this order.¹⁰

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹⁰For purposes of this opinion and order, the respondent must physically surrender his certificate to any appropriate representative of the Federal Aviation Administration, pursuant to FAR §61.19(f).